IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Crl. Misc. No. 50757-M of 2005

DATE OF DECISION : 10.10.2006

Balwinder Kaur and others

.... PETITIONERS

Versus

Bura Singh

..... RESPONDENT

CORAM :- HON'BLE MR. JUSTICE SATISH KUMAR MITTAL

Present: Mr. Manohar Dadwal, Advocate,
for the petitioners.

None for the respondent.

* * *

Smt. Balwinder Kaur, a helpless wife, and her two destitute minor children have filed this petition under Section 482 of the Code of Criminal Procedure (hereinafter referred to as `the Code') raising a question of law : Whether a Judicial Magistrate can consign to record room the execution application filed by the applicants under Section 128 of the Code to execute an order of maintenance passed by him, as in spite of the fact that the respondent remained in judicial custody for more than one month, the claim of maintenance could not stand satisfied; and whether in such situation, the Judicial Magistrate is bound to execute the order of maintenance passed by him by adopting other methods, as provided under Section 421 of the Code.

2. The brief facts of the case are that petitioner No.1 was married with the respondent. After the marriage, respondent maltreated her and she along with her two minor children was thrown out of the matrimonial home by the respondent. Thereafter, petitioner No.1 along with her minor children started residing with her parents at their mercy. She was not in a position to maintain herself and her children. Consequently, the petitioners filed an application under Section 125 of the Code for grant of maintenance

allowance. The Judicial Magistrate Ist Class, Dasuya, vide his order dated 19.10.2002 allowed the said application and granted maintenance allowance at the rate of Rs. 400/- per month to petitioner No.1 and Rs. 250/- per month each to petitioners No.2 and 3. But the respondent-husband did not pay the said amount. Therefore, on 4.12.2002, the petitioners filed execution application under Section 128 of the Code for recovery of the maintenance amount from the respondent. In pursuance to the execution application, the Judicial Magistrate issued notice to the respondent, but in spite of the notice, he did not appear in the court. He intentionally and deliberately avoided the service. Thereafter, non-bailable warrants to secure his presence in the court for payment of arrears of maintenance amount were issued. In response to the non-bailable warrants, the respondent was arrested and sent to judicial custody by the court as he did not pay the amount of maintenance. He remained in judicial custody for more than one month. Thereafter, on 28.7.2005, the Judicial Magistrate Ist Class, ordered release of the respondent on the ground that he cannot be kept in judicial custody for more than one month for non payment of maintenance allowance. However, the execution application filed by the petitioners was also ordered to be consigned to the record room. Impliedly, it has been said that since the respondent has remained in judicial custody for a period of more than one month, therefore, the execution application filed by the petitioners stands satisfied. The said order has been challenged by the petitioners in this petition.

3. I have heard counsel for the petitioners and gone through the impugned order.

4. Learned counsel for the petitioners contends that the Judicial Magistrate could not consign the execution application to the record room without recovering the amount of maintenance by means of other methods, as provided under Section 421 of the Code. Learned counsel submits that sentencing a person to jail is one of the mode of enforcement of the maintenance order. It is not a mode of satisfaction of the liability. If a person fails to make payment of maintenance amount in spite of his

remaining in jail for a month, his liability to make payment cannot be said to be satisfied. The same will be satisfied only by making actual payment of the arrears. In such situation, the Magistrate should not have consigned the execution application of the petitioners to the record room, rather she should have adopted the other mode of enforcement of the maintenance order by attachment of the property of the respondent and order for recovery of the maintenance amount as arrears of land revenue. In support of his counsel, learned counsel for the petitioners relied upon a decision of the Supreme Court in ***Smt. Kuldip Kaur*** v. ***Surinder Singh,*** 1989 (1) RCR (Criminal) 105.

5. After hearing the arguments of learned counsel for the petitioners and going through the contents of the petition, in my opinion, the impugned order is not sustainable in the eyes of law. Section 125 of the Code provides for an order for maintenance to wives, children and parents. A Magistrate upon being about the proof of negligence or refusal on the part of the person from whom monthly allowance for the maintenance of the wife, child, father or mother as the case may be, is due, upon being satisfied about the fact that the person has sufficient means, may pass an order for monthly allowance under sub-sections (1) and (2) of Section 125 of the Code. Sub-section (3) of Section 125 of the Code provides that if any person so ordered fails without sufficient cause to comply with the order of maintenance, the Magistrate may for every breach of the order issue a warrant for levying the amount due in the manner provided for levying fine and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made. Section 128 of the Code provides for enforcement of order of maintenance passed by the Magistrate. In my opinion, sub-section (3) of Section 125 of the Code provides two modes for enforcement of the maintenance order; firstly by issuing a warrant for levying the amount due in the manner provided for levying fine and secondly may order for sentence of the defaulter to imprisonment for a term which may extend to

one month or until payment if sooner made. A sentence of imprisonment can be passed only if there has been willful neglect to comply with the order. The sentence for imprisonment is not in lieu of the default made by the person against whom the order of maintenance is passed. If the person remains in judicial custody for one month and does not pay the amount of maintenance, it will not wipe out his liability to pay the maintenance, which he refused to discharge. The amount of maintenance can still be recovered from him by the Judicial Magistrate by adopting other modes of recovery, which have been provided under Section 421 of the Code. In my opinion, if the maintenance order is passed, it becomes duty of the court itself to see that the payments are duly made. The only legal obligation placed on the wife, children or parents, in whose favour the order is made, is to present application within the prescribed period of limitation. When that is done, it is for the court to get its order enforced and see that it is complied with. The Supreme Court in ***Smt. Kuldip Kaur's case*** (supra) has held that liability of a person arising under order of maintenance would not stand discharged by sending the person in judicial custody for one month. The liability can be satisfied only by making the actual payment of the arrears. The purpose of sending such person to jail is not to wipe out the liability which he refused to discharge. The Supreme Court has observed as under :-

> "6. A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail is a `mode of enforcement'. It is not a `mode of satisfaction' of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. Be it also realised that a person ordered to pay

> monthly allowance can be sent to jail only if he fails to pay monthly allowance `without sufficient cause' to comply with the order. It would indeed be strange to hold that a person who `without reasonable cause' refused to comply with the order of the Court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail sentence of jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrears. Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live. Instead of providing them with the funds, no useful purpose would be served by sending the husband to jail. Sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability. The section does not say so. The Parliament in its wisdom has not said so commence does not support such a construction. From where does the Court draw inspiration for persuading itself that the liability arising under the order for maintenance would stand discharged upon an effort being made to recover it? The order for monthly allowance can be discharged only upon the monthly allowance being recovered. The liability cannot be taken to have been by sending the person liable to pay the monthly allowance, to jail....”

Thus, from the above, it is clear that merely because the respondent remained in custody for a period of more than one month, it cannot be said that his liability to make payment of maintenance amount has been satisfied. It is the duty of the court to see that payment of maintenance amount is actually made.

6. Sub-section (3) of Section 125 of the Code provides that the

Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fine. Section 421 of the Code lays down the procedure for levy of fine, which reads as under :

> **S. 421** (1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may -
>
> (a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;
>
> (b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter :
>
> Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under Section 357.
>
> (2) The State Government may make rules regulating the manner in which warrants under Clause (a) of sub-section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.
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> (3) Where the Court issues a warrant to the Collector under Clause (b) of sub-section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law :
>
> Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

7. From the reading of the aforesaid provision, it is clear that there

are two modes for issuing warrant, one being by attachment and sale of movable property belonging to the offender and the other being by issuance of a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter. It is, however, provided that recovery of fine can be made by either or by both of these methods.

8. In the instant case, keeping in view the fact that in spite of adopting the mode of imprisonment, arrears of maintenance remained unpaid, the Judicial Magistrate should have adopted both the methods to recover the amount of maintenance from the respondent in addition to the mode of imprisonment. Thus, in my opinion, the Judicial Magistrate has committed grave illegality while consigning the execution application to the record room and not adopting the other alternative method for recovery of the amount of maintenance.

9. In view of the above, this petition is allowed. The impugned order dated 28.7.2005, passed by Judicial Magistrate Ist Class, Dasuya, is set aside and the Judicial Magistrate is directed to enforce the order of maintenance by adopting the method provided for recovery of fine under Section 421 of the Code, in accordance with law.

October 10, 2006 **(SATISH KUMAR MITTAL)**
ndj **JUDGE**

Refer to Reporter